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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

SYLVIA BLOUNT, Executive Director of Vacaville State Hospital, and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY LEE WASHINGTON, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court on federal collateral review of an erroneously admitted confession may apply a stricter harmless-error analysis equivalent to a "beyond a reasonable doubt" standard instead of the "actual prejudice" standard dictated by Brecht v. Abrahamson, 507 U.S. 619 (1993)?

PARTIES TO THE PROCEEDING BELOW

Troy Lee Washington, respondent, herein, was the petitioner and appellant in the appeal before the Ninth Circuit Court of Appeals from the denial of his petition for writ of habeas corpus by the United States District Court for the Southern District of California. Respondents and Appellees in the Ninth Circuit proceeding were Jon DeMorales, Executive Director of Atascadero State Hospital at Atascadero, California, (where Washington was incarcerated pursuant to the state court judgment at issue in this proceeding when his petition for writ of habeas corpus was filed in the District Court), and the Attorney General of the State of California.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

No.

SYLVIA BLOUNT, Executive Director of Vacaville State Hospital, and DANIEL E. LUNGREN, Attorney General, *Petitioners*,

v.

TROY LEE WASHINGTON, *Respondent*.

Sylvia Blount, Executive Director of Vacaville State Hospital, and Daniel E. Lungren, Attorney General for the State of California, respectfully petition for a writ of certiorari to review the August 28, 1997, judgment of the United States Court of Appeals for the Ninth Circuit, reversing the district court's order denying the petition for writ of habeas corpus and thereby reversing respondent's state convictions for special circumstance rape-murder and burglary.

OPINIONS *BELOW*

A copy of the unpublished opinion of the Ninth Circuit Court of Appeals in Washington v. DeMorales, et al., filed August 28, 1997, in No. 96-55275, appears at Appendix A to this petition. A copy of the unpublished District Court's Judgment and Order Denying Petition for Writ of Habeas Corpus in Washington v. DeMorales, et. al., appears at Appendix B. A copy of the unpublished

Report and Recommendation of United States Magistrate Judge on a Petition for Writ of Habeas Corpus by a Person in State Custody in Washington v. DeMorales, et al., filed July 6, 1995, in DC 94-1413-R (RBB), appears at Appendix C. A copy of the unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One, in People v. Washington, filed October 6, 1993, in D016646, appears at Appendix D.

STATEMENT OF JURISDICTION

The Memorandum Opinion of the Ninth Circuit Court of Appeals was filed on August 28, 1997. The Ninth Circuit issued a stay of mandate to October 24, 1997. This Court has jurisdiction to review the judgment by the Court of Appeals on a writ of certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the United States Constitution provides, in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law . . ."

Title 28, Section 2254(a) of the United States Code provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

Washington is currently serving a sentence of life without possibility of parole in a California mental state hospital for the special circumstance first degree strangulation murder of Deborah Barksdale committed during the commission of the crimes of forcible rape of Barksdale and first degree burglary of Barksdale's residence. Cal. Pen. Code, §§ 187(a), 261(2), 459, 190.2(a)(17). 2CT at 324-325, 360.[1]

Washington's conviction and sentence were affirmed on direct appeal by the Court of Appeal, Fourth Appellate District, Division One. The Court of Appeal found the confession was erroneously admitted because the police failed to terminate the interview when Washington invoked his right to remain silent. However, the Court of Appeal found the admission of the confession harmless under Chapman v. California, 386 U.S. 18, 23, 17 L. Ed. 2d 705, 87 S. Ct. 824 (1967), because the evidence against Washington, apart from his confession, was "compelling." See Appendix D. The California Supreme Court denied Washington's petition for writ of habeas corpus in which he raised, inter alia, his claim concerning the erroneous admission of his confession.

Washington invoked the jurisdiction of the United States District Court for the Southern District of California, under 28 U.S.C. section 2254. In his federal petition for writ of habeas corpus Washington renewed, inter alia, his claim that the confession was erroneously admitted because he invoked his right to silence. The Magistrate Judge's report and recommendation concluded that notwithstanding the erroneous admission of Washington's confession, the evidence of guilt was

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1. "CT" refers to the Clerk's Transcript of the state court trial proceedings which was lodged with the District Court.

"compelling," and thus under Brecht v. Abrahamson, 507 U.S. 619, 123 L. Ed. 2d 353, 113 S. Ct. 1710 (1993), the error was harmless as to the guilt conviction. See Appendix C.

The District Court issued its order and denied the writ of habeas corpus concluding that the erroneous admission of Washington's confession did not amount to reversible error under the Brecht harmless-error standard. The district court found the error harmless because other properly admitted evidence was "compelling" and "overwhelming." See Appendix B.

Washington filed a notice of appeal from the denial of the petition pursuant to the requirements of Rule 4(c) of the Federal Rules of Appellate Procedure. On February 13, 1996, the district court issued a certificate of probable cause pursuant to section 2253 of Title 28 of the United States Code and Rule 22(b) of the Federal Rules of Appellate Procedure.

On appeal the Ninth Circuit Court of Appeals concluded that the admission of the confession was not harmless under the Brecht harmless-error standard because despite other "strong" evidence of guilt apart from the inadmissible confession, the confession was "by far the most influential proof" of guilt. See Appendix A.

STATEMENT OF FACTS

On the morning of November 6, 1990, Deborah Barksdale's body was found in the trunk of her car parked in her condominium garage. She had been raped and strangled. Her larynx had been fractured and she had scratches, abrasions and bruises to her face, upper chest and shoulders. 3RT 6-7, 101-110, 115, 118-120[2/]

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2. "RT" refers to the Reporter's Transcript from the state court trial lodged with the District Court.

Barksdale's death was determined to have occurred between 10 p.m. on November 2, 1990 and 1:30 a.m. on November 3, 1990. 3RT 118-120, 132-133.

In a video-taped police interview, Washington confessed to the crimes. Washington's confession was admitted at trial. Washington stated he had used a key to enter Barksdale's apartment and attacked her while she slept. He also described how he raped, beat, suffocated, and finally, strangled Barksdale to death within a 2 1/2 hour time period. 3RT 60, 63-65; 1CT 34-109; 2CT 266.

Besides Washington's confession, other circumstantial evidence linked him to the crimes. Shortly before 11 p.m. on the night of the murder, a neighbor saw a person matching Washington's age and physical description standing in the condominium garage area of Barksdale's residence. At about 1:30 a.m., the condominium security guard saw a black man matching Washington's description leave the condominium complex and get into a parked car, registered to Washington. The security guard provided the license plate number to the police. 3RT 23, 26-28, 40-46, 60-61, 63-65.

DNA testing established that the sperm found in Barksdale's vagina and on her bed sheets was Washington's sperm. 3RT 134-135, 137-140.

Evidence of motive and opportunity was also present. Washington was a former employee of Barksdale's temporary employment agency and had been terminated by Barksdale in August 1990, three months prior to the instant crime. 1CT 35-36. The week before Barksdale's death, Washington called her office to reapply for work and left messages which Barksdale never returned. 1CT 36-37. The week prior to her death, he went to her business to talk to her. The day before the murder Washington unsuccessfully attempted to contact Barksdale. Barksdale avoided Washington and told co-workers she feared him. 1CT 36-38, 69, 72. Washington knew where Barksdale lived and had been at her

condominium during his employment with Barksdale. 2RT 2-5, 21, 1 CT 42, 52.

REASONS FOR GRANTING THE PETITION

Certiorari is warranted because the Ninth Circuit's decision reversing a state conviction on collateral review based on the erroneous admission of a confession despite other "strong" and "compelling" evidence of guilt apart from the confession, makes it clear it is disregarding, in practice, Brecht's requirement of "actual prejudice" in assessing the error. Instead, the Ninth Circuit is applying a stricter standard of harmless-error equivalent to Chapman's "beyond a reasonable doubt" standard because it considers confessions, the "most influential proof of guilt." In effect, the Ninth Circuit is treating error involving erroneously admitted confessions as a type of trial error warranting a stricter harmless-error standard than Brecht's "substantial and injurious effect." The result will have a serious impact in the review of state court judgments where there has been an erroneously admitted confession.

ARGUMENT

THE NINTH CIRCUIT'S DECISION IMPROPERLY IMPOSES A STRICTER HARMLESS-ERROR STANDARD ON COLLATERAL REVIEW OF AN ERRONEOUSLY ADMITTED CONFESSION THAN REQUIRED BY BRECHT'S "ACTUAL PREJUDICE" HARMLESS-ERROR STANDARD

In this case not only did the Ninth Circuit fail to properly assess the error in light of the totality of the remaining evidence presented to the jury, it also applied a more onerous harmless-error standard equivalent to Chapman's "beyond a reasonable doubt" standard.

Four years ago this Court in Brecht v. Abrahamson, 507 U.S. 619, replaced the harmless error standard under Chapman v. California, 386 U.S. 18, 24 (1967), with a less onerous harmless-error standard to be applied on collateral review of trial error. Under Brecht a habeas corpus petitioner is not entitled to relief unless the error had a "substantial and injurious effect or influence in determining the jury's verdict," Brecht v. Abrahamson, 507 U.S. at 623, or unless the record is so evenly balanced that the reviewing judge is in "grave doubt" as to the error's harmlessness. O'Neal v. McAninch, 513 U.S. 432, 435, 130 L. Ed. 2d 947, 115 S. Ct. 992, 994 (1995). "Grave doubt" exists only if "the matter is so evenly balanced" the judge feels in "virtual equipoise as to the harmlessness of the error." Id. An inadmissible confession fits into the category of constitutional violations characterized by this Court as "trial error." See Arizona v. Fulminante, 499 U.S. 279, 307, 113 L. Ed. 2d 302, 111 S. Ct. 246 (1991), and must be

assessed for "actual prejudice" in the context of the whole record to determine its effect on the trial. Brecht, at 637.

Here, the Ninth Circuit recognized Brecht as the applicable harmless error standard, and acknowledged the existence of "strong" evidence of guilt apart from the erroneously admitted confession. However, it then proceeded to disregard the remaining evidence in assessing "actual prejudice" of the inadmissible confession, thus rendering its purported application of Brecht's harmless-error standard a nullity.

Instead, the Ninth Circuit assessed the harm of the inadmissible confession by focusing, to the exclusion of all other evidence, solely on the prosecutor's closing and rebuttal arguments. Nothing in the court's decision suggests the court engaged in a thorough review of the record to assess the effect of the error as required by Brecht. Rather, the court limited its inquiry to whether the jury could have been influenced by the inadmissible confession based on the prosecutor's closing argument. Unlike the state appellate court judges and the federal magistrate judge and district court judge, the Ninth Circuit did not discuss or even mention the other properly admitted evidence presented to the jury.

The remaining evidence of Washington's guilt characterized by the district court as "compelling," consisted of DNA evidence establishing the sperm found in the victim's vagina belonged to Washington, circumstantial evidence establishing Washington's presence at the victim's home within the two and half hour period of her death, as well as motive and opportunity. See Appendix B. While the state appellate judges and two federal court judges considered Washington's confession significant, they proceeded to evaluate and assess the impact of the inadmissible confession on the trial in the context of all the other remaining evidence of guilt presented to the jury. In so doing, the state appellate court and federal district court concluded the other

evidence apart from the inadmissible confession was "overwhelming" and "compelling" and rendered the error harmless. See Appendices B, C, D. In contrast, the Ninth Circuit concluded the error was prejudicial because the erroneously admitted confession "was by far the most influential proof" of guilt, notwithstanding other "strong" circumstantial evidence of guilt. Appendix A. The only way the Ninth Circuit can find this error harmful despite other "strong" and "compelling" evidence of guilt, is to disregard Brecht and apply a stricter standard than "actual prejudice."

Of far greater alarm and concern than the misinterpretation and misapplication of Brecht in this case, is the Ninth Circuit's continuing attempt to impose a more onerous standard of harmless error for certain types of trial error. This is demonstrated by the Court's assessment of harmlessness in Pope v. Zenon, 69 F.3d 1018 (9th Cir. 1995), which it cited in this case to show what type of evidence it required to find harmless an erroneously admitted confession. In Pope v. Zenon there were two confessions; one inadmissible and the other admissible. The Ninth Circuit attached great significance to direct evidence of the properly admitted confession, as well as to a "mountain of damning circumstantial evidence." Id. at 1025. Only then did the Ninth Circuit conclude the erroneously admitted confession was "'unimportant in relation to *everything else* the jury considered on the issue in question'" Pope v. Zenon, at 1025, quoting Yates v. Evatt, 500 U.S. 391, 403, 114 L. Ed. 2d 432, 111 S. Ct. 1884, 1893 (1991) (emphasis added). The Ninth Circuit's reliance on Yates, a case where Chapman's harmless-error standard was applied to an erroneous presumption, shows the court, in effect, employed a Chapman analysis in Pope v. Zenon.

Based on the result in this case and its prior decision in Pope v. Zenon, it is quite clear the Ninth Circuit requires a "mountain of damning [other]

circumstantial evidence" and the inadmissible confession be "unimportant" in relation to other evidence before it is willing to find the error harmless. This certainly is a far more onerous harmless-error standard than Brecht's "actual prejudice." It imposes what in practice is the equivalent of the Chapman "beyond a reasonable doubt" harmless-error standard.

This is not the first time the Ninth Circuit has attempted to modify Brecht by imposing a more onerous harmless-error standard. This Court recently was required to correct the Ninth Circuit's modification and misapplication of Brecht in the context of jury instructions. California v. Roy, 519 U.S. __, __, 136 L. Ed. 2d 266, 117 S. Ct. 337, 339 (1996) (per curiam), rev'g Roy v. Gomez, 81 F.3d 863 (9th Cir. 1996) (en banc). The Ninth Circuit's continuing reluctance to apply the Brecht standard, this time in the context of erroneous admission of confessions, requires this Court to issue yet another "wake-up call." Jeffries v. Wood, 114 F.3d 1484, 1507 (9th Cir. 1997) (Kozinski, J., dissenting).

When read together this case and its prior decision in Pope v. Zenon demonstrates the Ninth Circuit is applying to trial error involving inadmissible confessions a stricter harmless-error standard than the "actual prejudice" standard of Brecht.[3]

A petition for certiorari is warranted to clarify whether the Ninth Circuit Court of Appeals is correct in presuming a confession, by nature is a special type of trial

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3. The Ninth Circuit Court implicitly finds that confessions, in and of themselves, are so probative and thus so prejudicial that remaining evidence, even if compelling or strong, cannot permit a harmless error finding under Brecht. This conclusion is inconsistent with Brecht's recognition that trial error may be deemed harmless in the context of the remaining evidence. It also defies common sense which dictates that the quality and strength of other properly admitted evidence lessens the impact erroneously admitted evidence may have on the jury's verdict.

error requiring a stricter standard of harmless-error than the "substantiated and injurious effect" standard dictated by Brecht.

CONCLUSION

Petitioner respectfully requests a writ of certiorari issue.

Dated: November 4, 1997.

Respectfully submitted,

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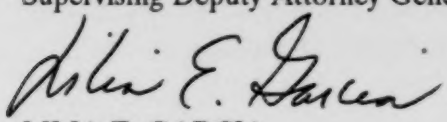

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